UNITED STATES DEPARTMENT OF LABOR • OFFICE OF ADMINISTRATIVE LAW JUDGES

Whistleblower Newsletter Sarbanes-Oxley Cases

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PROCEDURE BEFORE FEDERAL DISTRICT COURT

FEDERAL DISTRICT COURT JURISDICTION; RESPONDENT NOT NAMED IN THE ADMINISTRATIVE COMPLAINT

In ***Hanna v. WCI Communities, Inc.***, No. 04-80596-CIV. (S.D. Fla. Nov. 18, 2004), the district court dismissed the action against an individual who had been mentioned but not listed as a named Respondent. in the original administrative complaint filed with DOL, thereby depriving DOL of the opportunity to issue a final decision within 180 days of the filing of the administrative complaint. The court rejected the Plaintiff's assertion that his claim should not be dismissed against this individual because he had been identified in the original DOL complaint as having a role in the Plaintiff's termination. The court wrote:

> Mr. Hanna's argument misunderstands the purpose of filing an administrative complaint under the Sarbanes-Oxley Act's procedural framework. ...[T]he Act requires an aggrieved employee to file an administrative complaint to "afford OSHA the opportunity to resolve the allegations administratively." *Willis v. VIE Financial Group, Inc.*, No. 04-435, 2004

U.S. Dist. LEXIS 15753 (E.D. PA. Aug. 6, 2004) (citing 18 U.S.C. § 1514A(b)(1)(A); 29 C.F.R. § 1980.103(e)). Mr. Hanna's failure to name Mr. Eure in his administrative complaint failed to afford OSHA the opportunity to resolve Mr. Hanna's allegations through the administrative process. Even if the court assumed that Mr. Eure was placed on notice that he had allegedly violated the law, that notice has no consequence as to whether OSHA was placed on notice that it was required to investigate Mr. Eure's actions in this case.

REQUEST FOR HEARING

TIMELINESS OF REQUEST FOR HEARING; DATE OF RECEIPT OF OSHA FINDINGS; SUMMARY JUDGMENT STANDARD

The ALJ erred in granting summary judgment to the Respondent based on a finding that the Complainant's request for hearing was not timely under the 30-day limitations period. OSHA denied the complaint on January 16, 2004 and the Complainant did not file her request for hearing until March 4, 2004. The Complainant, however, averred in her March 4 filing that she did not receive the OSHA finding until February 4, 2004. Since on a motion for summary judgment the evidence must be viewed in the light most favorable to the non-moving party, summary judgment should not have been granted. ***Reddy v. Medquist, Inc.***, ARB No. 04-123, ALJ No. 2004-SOX-35 (ARB Sept. 30, 2005).

TIMELINESS OF COMPLAINT

TIMELINESS OF COMPLAINT; FILING BY E-MAIL; SUMMARY JUDGMENT STANDARD

The ALJ erred in granting summary judgment to the Respondent based on a finding that the complaint was not timely where OSHA did not receive the complaint until after the limitations period, but a handwritten note on the front of the complaint indicated that the complaint was "originally submitted via email" within the limitations period. Because SOX complaints may be filed by e-mail, 29 CFR § 1980.103(d), and viewing the evidence in the light most favorable to the non-moving party when deciding a motion for summary judgment, summary judgment should not have been granted. ***Reddy v. Medquist, Inc.***, ARB No. 04-123, ALJ No. 2004-SOX-35 (ARB Sept. 30, 2005).

TIMELINESS OF COMPLAINT; TRIGGER DATE OF LIMITATIONS PERIOD; EQUITABLE TOLLING; EQUITABLE ESTOPPEL

The ARB affirmed the ALJ's finding that the Complainant knew on the date of his suspension that he was going to be fired. The record, however, also contained an e-mail dated several weeks later to the Complainant from the General Counsel for the Respondent's parent company which suggested that a final decision had not been made on the Complainant's employment status. The ARB, therefore, found that the date that limitations period began to run was the date on which the Complainant was

later informed verbally and in writing that he had been fired. Nonetheless, even using that later date the complaint was still untimely.

The Complainant alleged that he was entitled to equitable tolling because, among other reasons, he was unaware of the Respondent's unlawful motivation for his termination until within the limitations period. The Board rejected this argument, writing:

> Neither the statute nor its implementing regulations indicate that a complainant must acquire evidence of retaliatory motive before proceeding with a complaint. Halpern's failure to acquire evidence of XL's motivation for his suspension and firing did not affect his rights or responsibilities for initiating a complaint pursuant to the SOX. *See Wastak v. Lehigh Valley Health Network*, 333 F.3d 120, 126 (3d Cir. 2003), citing *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1386 (3d Cir. 1994) ("a claim accrues in a federal cause of action upon awareness of actual injury, not upon awareness that this injury constitutes a legal wrong."). We therefore conclude that Halpern's failure to acquire such evidence does not constitute an extraordinary circumstance warranting tolling of the limitations period.

The Board also rejected the Complainant's argument that he was entitled to equitable estoppel based on the assertion that the Respondent misled him into believing that he would not be fired. The Board found no evidence that the Respondent misled the Complainant regarding his termination. ***Halpern v. XL Capital, Ltd.***, ARB No. 04-120, ALJ No. 2004-SOX-54 (ARB Aug. 31, 2005)

PROCEDURE BEFORE ARB

WAIVER OF ARGUMENTS NOT PRESENTED BEFORE THE ALJ

Where the Complainant had the opportunity to make her procedural due process arguments before the ALJ, but did not do so, the ARB found that she waived such arguments for appeal. ***Reddy v. Medquist, Inc.***, ARB No. 04-123, ALJ No. 2004-SOX-35 (ARB Sept. 30, 2005).

MOTION FOR ORDER REQUIRING POSTING OF SUPERSEDEAS BOND; ARB DOES NOT HAVE THE AUTHORITY TO GRANT SUCH A REMEDY

In ***Kalkunte v. DVI Financial Services, Inc.***, ARB No. 05-139, ALJ No. 2004-SOX-56 (ARB Aug. 26, 2005), the ARB denied the Complainant's motion requesting that the Board issue an order requiring the Respondent to post a supersedeas bond, the Board finding that nothing in the delegation of authority to the Board from the Secretary nor in the SOX provided the Board with the authority to grant the requested relief. The Complainant had received a favorable ruling from the ALJ, but feared that because the Respondent was engaged in bankruptcy proceedings and

was actively liquidating its assets, it would be unlikely to have any assets remaining by the time the Board issued its decision.

PROCEDURE BEFORE OALJ/GENERALLY

DISCOVERY; ATTORNEY WORK PRODUCT, ATTORNEY-CLIENT AND SELF EVALUATION PRIVILEGES; PROTECTION OF REPORT PREPARED BY CONSULTANT FOR RESPONDENT'S GENERAL COUNSEL

In ***Penesso v. LLC International, Inc.***, 2005-SOX-16 (ALJ Mar. 18, 2005), the Complainant had filed a discovery request for a report and related documents prepared by a consultant hired by the Respondent to investigate its subsidiary's operations in response to the Complainant's allegations of financial mismanagement. The Respondent asserted three privileges: attorney work product, attorney-client and self-evaluation. The ALJ agreed with the Respondent's argument that the consultant, who had been hired for an investigation initiated by the Respondent's general counsel and who reported only to the general counsel, was considered to be an agent of the attorney and its report therefore subject to the same privileges as if the attorney had prepared the report himself.

The ALJ found that attorney work product privilege did not apply because the consultant's report had not been prepared "in anticipation of litigation." However, the ALJ found that the attorney-client privilege did apply in light of the Supreme Court decision in *Upjohn Co. v. U.S.*, 449 U.S. 383, 101 S.Ct. 677 (1981). The ALJ did not reach the question of whether the self-evaluation privilege would be recognized (the ALJ noting that most jurisdictions do not recognize it).

PROTECTION OF INFORMATION; PRIVACY; CONFIDENTIALITY

SEALING THE RECORD; BURDEN ON MOVANT; PUBLIC INTEREST

In ***Thomas v. Pulte Homes, Inc.***, 2005-SOX-9 (ALJ Aug. 9, 2005), the Complainant moved to withdraw objections to the OSHA findings after it became clear that she would loose on the issue of the timeliness of the complaint. The Complainant requested that the record be sealed. The ALJ noted that a request for the record to be sealed may be made by requesting a protective order pursuant to 29 C.F.R. §§18.15 and 18.46 or requesting a designation of confidential commercial information pursuant to 29 C.F.R. §70.26.

In regard to the motion for a protective order, the ALJ noted that the movant has the burden of showing good cause by demonstrating a particular need for protection "with specificity" and that the fact that the motion is unopposed is not determinative as the public's need for disclosure may also be involved. The ALJ wrote: "As the whistleblower provision in the Sarbanes-Oxley Act is involved, there is a public interest in the protection of investors, employees, and members of the public by improving the accuracy and reliability of financial disclosures by publicly traded corporations. *See generally* S. Rep. No. 107-146, 2002 WL 863249 (May 6, 2002)." Slip op. at 2 (footnote omitted).

In the instant case, the ALJ found that the Complainant had failed to identify "a

privacy interest or potential harm or embarrassment that could result from disclosure of the record in this case, and Complainant has not referenced any privileged, sensitive, or classified information that is contained in the record."

Similarly, the ALJ found that the Complainant had failed to provide a rationale for the record being designated as containing confidential commercial information under 29 C.F.R. §70.26.

CONFIDENTIALITY; JUDICIAL RESTRAINT IN DRAFTING OF DECISION TO AVOID UNNECESSARY DETAIL, EVEN THOUGH PARTIES HAD FAILED TO PROVIDE GROUNDS FOR FORMAL PROTECTIVE ORDER

In ***Bechtel v. Competitive Technologies, Inc.***, 2005-SOX-33 (ALJ Oct. 5, 2005), the parties had filed a pre-hearing joint motion for protective order that applied to many of the parties' documents. The ALJ declined to consider issuance of this order as the parties had failed to explain the need for such action in conformance with the Rules of Practice and Procedure before OALJ, 29 C.F.R. § 18.15, and had declined the ALJ's invitation to file a conforming motion. At the hearing, the ALJ advised the parties that she would consider each document individually on motion to determine whether a protective order was appropriate. Neither party, however, sought a protective order for any exhibit on any grounds during the course of the hearing. In drafting the decision, however, in deference to the joint motion of the parties, the ALJ refrained from including a description of each exhibit.

[Editor's note: In addition to refraining from describing each exhibit, the ALJ appears when quoting some testimony to have omitted certain information that did not impact on disposition of the issues before the ALJ.]

COVERED RESPONDENT

COVERED EMPLOYER; FACT THAT RESPONDENT HAD GOVERNMENT CONTRACTS AND ARGUMENT THAT PUBLIC POLICY FAVORS PROTECTING WHISTLELBLOWERS ARE INSUFFICIENT TO PERMIT A SOX CASE TO PROCEED WHERE THE RESPONDENT IS NOT A PUBLICLY TRADED COMPANY

In ***Judith v. Magnolia Plumbing Co., Inc.***, 2005-SOX-99 and 100 (ALJ Sept. 20, 2005), the Complainants did not contest that the Respondent was neither a publicly traded company or that it did not have a class of securities registered under section 12 of the Securities Exchange Act of 1934. Rather, the Complainants argued that the SOX should apply because the Respondent had numerous contracts with municipal and federal governments. The Complainant also argued that public policy to protect whistleblowers who seek to bring acts of malfeasance before the public should permit their SOX case to proceed. The ALJ rejected both arguments: "[i]f a company is not publicly traded, the Act simply does not apply."

COVERED EMPLOYER; NON-PUBLICLY TRADED SUSIDIARY OF PUBLICLY TRADED PARENT

In ***Bothwell v. American Income Life***, 2005-SOX-57 (ALJ Sept. 19, 2005), the Complainant alleged that the company that employed him was a covered employer

under SOX, even though it was not a publicly traded company, because it is a subsidiary of a publicly traded company. The ALJ reviewed the statutory language and legislative history of SOX and concluded that the Complainant's argument was not meritorious: "If Congress had wanted to include non-publicly traded subsidiaries of publicly-traded parent companies as covered employers, it could have done so in drafting the statute."

COVERED EMPLOYER; MOTION TO ADD PUBLICLY TRADED PARENT COMPANY BEFORE THE ALJ; LIMITED REFERENCES TO PARENT IN PLEADINGS INADEQUATE TO ESTABLISH EARLIER NAMING AS RESPONDENT; TIMELINESS OF ATTEMPT TO AMEND COMPANY; RELATION BACK

In ***Bothwell v. American Income Life***, 2005-SOX-57 (ALJ Sept. 19, 2005), the Complainant sought to add as a Respondent the publicly traded parent company of the company that had employed him - and which had been named as the Respondent - after the Respondent subsidiary had filed a motion to dismiss based on it not being a publicly traded company subject to SOX.

The Complainant argued that he had requested inclusion of the publicly traded parent company consistently throughout the case. The ALJ, however, found the pleadings' limited references to the parent company did not exhibit any allegation of "facts that could conceivably make [the parent company] liable under the Act." In addition, the ALJ found that the Complainant's attempt to add the parent company was untimely, as it occurred more than 90 days after the date of his termination. *See* 29 C.F.R. § 1980.103. The ALJ found that the "relation back" standard of FRCP 15(c) was not met because it was undisputed that the parent company did not have notice of the action prior to the expiration of the statute of limitations.

COVERED EMPLOYER; PARENT COMPANY; MERE NAMING OF PARENT NOT SUFFICIENT TO ESTABLISH LIABILITY; RATHER, GROUNDS MUST EXIST FOR PIERCING OF CORPORATE VEIL

In ***Bothwell v. American Income Life***, 2005-SOX-57 (ALJ Sept. 19, 2005), the ALJ found that the Complainant had untimely attempted to add a publicly traded parent company as a named Respondent after the non-publicly traded subsidiary had moved for dismissal on the ground that it was not a covered employer under the SOX. The ALJ also ruled that, assuming that the parent had been timely named as a Respondent, it was not automatically to be assumed to fall under the purview of SOX. The ALJ noted that other ALJs had required sufficient commonality of management and purpose to justify piercing the corporate veil and holding the parent liable for its subsidiary's actions. Conceding that courts have found parent companies liable for their subsidiaries' actions when the two corporate identities are used interchangeably, the ALJ found that liability nonetheless extends only to areas where the parent has exerted its influence and control.

In the instant case, the Complainant pointed to certain indicia of interchangeability (e.g., litigation costs combined into single liability; references to subsidiaries as "distribution systems in the parent company"; commonality of directors and officers; etc.), but the ALJ found that such evidence was insufficient to justify piercing the

corporate veil. The ALJ pointed out that the was no evidence that the subsidiary was acting as an agent of the parent with respect to employment practices toward the Complainant or any other employee; that the parent took any part in hiring or terminating the Complainant or had any role in the payment of his salary; or that the parent's employees had any interaction with the Complainant.

COVERED EMPLOYER; MERE FACT THAT RESPONDENT SUBJECT TO REPORTING REQUIREMENTS OF OTHER FEDERAL LAWS DOES NOT ESTABLISH SOX COVERAGE; MERE FACT THAT RESPONDENT'S DONORS ARE SIMILAR TO SHAREHOLDERS DOES NOT ESTABLISH COVERAGE

In ***Stevenson v. Neighborhood House Charter School***, 2005-SOX-87 (ALJ Sept. 7, 2005), the Respondent was not shown to be a company with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 nor to be a company that is required to file reports under Section 15(d) of that Act. The Complainant asserted that coverage should be found under the whistleblower provision of SOX because the Respondent had a retirement plan with benefits subject to reporting and disclosure requirements under ERISA. The ALJ found this fact to be irrelevant, writing that nothing in the SOX or its legislative history "suggests that being subject to reporting requirements under one federal law, such as ERISA, automatically extends coverage of any other federal legislation, such as Sarbanes-Oxley, to a company."

The Complainant also argued SOX whistleblower coverage based on allegations that the Respondent had violated other parts of SOX, and that the Respondent was subject to reporting under SEC Rules 10b5 and 15c2-12. The ALJ again found these allegations to be irrelevant.

Finally, the Complainant argued coverage based on the fact that the Respondent receives funds from both private donors and public corporations. The Complainant argued that such donors are much like the shareholders of a publicly traded corporation. The ALJ found that there was "no indication that Congress intended for a private company to fall within the purview of Sarbanes-Oxley simply because it receives funds from private donors or public companies."

EXTRATERRITORIAL COVERAGE; EMPLOYMENT OVERSEAS FOR A FOREIGN SUBSIDIARY, BUT SUBSTANTIAL NEXUS TO THE U.S.

In ***Penesso v. LLC International, Inc.***, 2005-SOX-16 (ALJ Mar. 4, 2005), the Complainant was employed in Italy by the Italian subsidiary of a corporation headquartered in McLean, Virginia. The Respondent filed a motion for summary decision based on, inter alia, the proposition that the whistleblower provision of SOX does not have extraterritorial application, citing in support *Concone v. Capital One Financial Corp.*, 2005-SOX-6 (ALJ Dec. 3, 2005) and *Carnero v. Boston Scientific Corp.*, 2004 WL 1922132 (D.Mass. Aug. 27, 2004). The ALJ distinguished *Concone* and *Carnero*, finding that the facts in the case before him were materially different, the Complainant being a U.S. citizen, much of the protected activity having occurred in the U.S., and at least one of the alleged retaliatory actions (a decision not to issue bonuses) was made in the U.S. The ALJ concluded that "unlike *Concone* and *Carnero*, this case has a substantial nexus to the United States, and it is appropriate

for the complainant to bring this claim under §1514A of the Sarbanes-Oxley Act." Slip op. at 3 (footnote omitted).

EVIDENCE

INTERLOCUTORY APPEAL; RECORD OF DENIAL OF INTERLOCUTORY APPEAL IS PART OF RECORD FOR LATER REVIEW

In ***Windhauser v. Trane***, ARB No. 05-061, ALJ No. 2005-SOX-17 (ARB Aug. 31, 2005), the Respondent took an interlocutory appeal of the ALJ's order denying a stay of the Secretary's order of reinstatement. Subsequently the ALJ issued an order dismissing the case based on a settlement; the ALJ's order included a monetary sanction against the Respondent for its failure to reinstate the Complainant. The Respondent filed a timely petition for review of this order. The ARB then issued an order to show cause why the earlier interlocutory appeal should not be dismissed as moot. The Respondent, in response, agreed that the interlocutory appeal was moot, but stated that facts relating to the interlocutory appeal would likely be relevant to the appeal of the dismissal/sanctions order and requested that dismissal of the interlocutory appeal be without prejudice to its ability to present these facts in the appeal of the dismissal/sanctions order. The ARB ruled that the interlocutory review proceedings were part of the record for the Board's review on appeal of the sanctions order, and that the Respondent could present relevant facts in support of its petition for review of the sanctions order. The Board therefore dismissed the interlocutory appeal as moot.

BURDEN OF PROOF AND PRODUCTION

ELEMENTS OF SOX CAUSE OF ACTION

The legal burdens of proof set forth in AIR21, 49 U.S.C.A. § 42121(b), govern SOX actions. Accordingly, to prevail, a complainant must prove that: (1) the complainant engaged in a protected activity; (2) the respondent knew that the complainant engaged in protected activity; (3) the complainant suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. ***Reddy v. Medquist, Inc.***, ARB No. 04-123, ALJ No. 2004-SOX-35 (ARB Sept. 30, 2005).

SUMMARY JUDGMENT; COMPLAINANT'S RESPONSIVE BURDEN

A complainant must show the existence of a material issue of fact on an essential element of the SOX cause of action if challenged to do so on a motion for summary judgment. ***Reddy v. Medquist, Inc.***, ARB No. 04-123, ALJ No. 2004-SOX-35 (ARB Sept. 30, 2005).

BURDEN OF PROOF AND PRODUCTION
ADVERSE EMPLOYMENT ACTION

ADVERSE EMPLOYMENT ACTION; REMOVAL OF COMPLAINANT'S STATUS AS OFFICER OF THE COMPANY

In ***Bechtel v. Competitive Technologies, Inc.***, 2005-SOX-33 (ALJ Oct. 5, 2005), the ALJ, citing caselaw to the effect that an employment action must produce some tangible job consequence to be considered an "adverse action" within the context of the SOX, found that the Respondent had not engaged in adverse action when it removed the Complainant's status as an officer of the company. The Complainant had not even known that he was considered an officer until he asked to be relieved of the obligation to sign SOX disclosure statements. Further, there was no evidence that the change in status in any way deprived the Complainant of the ability to fully represent the company or hampered him in performance of his job duties. There was also no evidence that the Complainant lost salary or other privileges, or was otherwise adversely impacted in his employment.

ADVERSE ACTION; FAILURE TO CONDUCT PERFORMANCE EVALUATION

In ***Bechtel v. Competitive Technologies, Inc.***, 2005-SOX-33 (ALJ Oct. 5, 2005), the ALJ, found that no adverse action was implied by the Respondent's failure to conduct a review of Complainant's performance where the record did not show that this omission resulted in a loss of pay, raises, bonus, benefits, or negatively impacted Complainant's employment conditions in any way.

BURDEN OF PROOF AND PRODUCTION
PROTECTED ACTIVITY

PROTECTED ACTIVITY; FAILURE TO SHOW THAT INFORMATION HAD BEEN PROVIDED REGARDING FRAUD OR VIOLATION OF SEC RULE OR REGULATION

The Complainant, a medical transcriptionist, sent three e-mails to a regional manager complaining that local managers had "zapped" the line count of her transcriptions resulting in underpayment to the Complainant. The regional manager cancelled her contract after the third e-mail, the Complainant filed a SOX complaint, OSHA denied the complaint, and after the Complainant requested a hearing, the Respondent filed a motion for summary judgment before the ALJ on the ground that the Complainant had not made a showing of protected activity. The ALJ granted the motion and the ARB affirmed because the Complainant never explained how the e-mails "provided information about conduct she reasonably believed constituted a violation of the federal fraud statutes, or an SEC rule or regulation, or any other federal law relating to shareholder fraud." ***Reddy v. Medquist, Inc.***, ARB No. 04-123, ALJ No. 2004-SOX-35 (ARB Sept. 30, 2005).

PROTECTED ACTIVITY; DISTINCTION BETWEEN COMPLAINANT'S MISTAKEN, BUT REASONABLE BELIEF AND A COMPLAINANT'S BELIEF THAT WAS UNREASONABLE FROM THE OUTSET

The Complainant did not engage in protected activity when he accused the company's CEO of insider trading where the Complainant's suspicions where not based on a reasonable belief from the outset. The Complainant thought that the CEO had been attempting to purchase company stock based on advance knowledge of the results of a lawsuit that would bring a large amount of cash into the company. The ALJ, however, found that the Complainant's belief was based on very thin evidence -- a draft press release found in the trash that referred to the company's success in the litigation, a snippet of a telephone conversation the Complainant overheard in which the CEO was asking someone how he could buy 10,000 shares of something, and a rumor that a member of the Board of Directors had advance knowledge that the litigation had been resolved in Respondent's favor. The ALJ found that the Complainant did not consider the CEO could have been talking about anything. The ALJ distinguished instances where the Complainant has a reasonable belief that later turns out to be wrong from instances where the Complainant's belief was unreasonable from the outset. The ALJ also took into consideration the Complainant's own conduct -- he had not followed the company's standards of conduct procedure for making allegations regarding insider trading, and did not relate his suspicions to the head of audit committee. Although the Complainant might have believed that the head of the audit committee was involved in disseminating the insider information, he nonetheless did not alert any other Board member either. The ALJ also noted that the subject of insider trading had not been mentioned during the OSHA investigation or in response to the ALJ's order directing the Complainant to identify the bases for his SOX complaint. ***Bechtel v. Competitive Technologies, Inc.***, 2005-SOX-33 (ALJ Oct. 5, 2005).

BURDEN OF PROOF AND PRODUCTION
CLEAR AND CONVINCING EVIDENCE STANDARD

CLEAR AND CONVINCING EVIDENCE OF LEGITIMATE, NON-DISCRIMINATORY REASON FOR ADVERSE ACTION AND SHOWING THAT THERE WOULD HAVE TAKEN THE ACTION EVEN IN THE ABSENCE OF PROTECTED ACTIVITY; COMPANY'S TERMINATION OF SEVERAL HIGHLY PAID EMPLOYEES TO AMELIORATE DIRE FINANCIAL CIRCUMSTANCES

In ***Bechtel v. Competitive Technologies, Inc.***, 2005-SOX-33 (ALJ Oct. 5, 2005), the Respondent, a company that specializes in marketing of technologies, contended that none of the Complainant's activities contributed in any way to his discharge. The ALJ, however, disagreed. Taking into consideration the CEO's expression of admiration for loyalty, his denial of conversations involving serious accusations concerning his character, and the fact that he brought people of his choice to the company after the Complainant was terminated, the ALJ found that the Complainant's vocal objections to the Respondent's asserted lack of authority to represent technology, and his continued concerns regarding disclosure of information, were sufficient to establish the inference of a causal nexus. The ALJ therefore concluded that the burden shifted to the Respondent to present clear and

convincing evidence of a legitimate, non-discriminatory business reason for its decision, and to show that it would have taken the same unfavorable action in the absence of the Complainant's protected activity. The ALJ found that the Respondent carried that burden.

It was undisputed that Respondent's financial condition was poor and that the new CEO's focus was on bringing revenue to the company. The company employed about one dozen people and used consultants for specific projects that were designed to produce revenue. The Complainant's primary responsibility was to generate revenue, and had not been as successful with his projects as hoped; on one promising project the Respondent realized a only a small amount of retained earnings against substantial costs. The CEO had been critical of some of the Complainant's ideas and faulted the Complainant for failing to secure customers to license technologies for which he was responsible. The company faced imminent bankruptcy, and the Board of Directors approved the CEO's proposal for reducing costs to keep the company afloat through payroll savings and the elimination of cash bonuses, plus other cost savings. The CEO targeted the Complainant for discharge because he considered his contribution to the company limited. Two other employees were also terminated, and the company took other actions such as negotiating a reduction in its rent, reducing consulting costs, and -- in order to generate revenue -- selling the future value of expected litigation proceeds at a discount. The company relied upon consultants to produce revenue, which they successfully did. Ultimately the company survived.

The ALJ found that the Complainant failed to show that the Respondent's reasons were pretextual. The company's actions were designed to keep the company alive and out of bankruptcy until revenue could be realized. One of those actions included, *inter alia*, eliminating the salaries and personnel costs of three highly paid individuals. The fact that the company made a quick turn-around did not establish pretext. Moreover, it was known that the Complainant repeatedly raised issues regarding SEC disclosures, but prior to the termination the Respondent had continued to solicit his opinions, continued to give him work assignments and fostered his projects.

FRIVOLOUS COMPLAINT; SANCTIONS

FRIVOLOUS OR BAD FAITH COMPLAINT; AWARD OF ATTORNEY'S FEES AND COSTS

The ARB declined to impose attorney's fees and costs against the Complainant under 49 U.S.C.A. § 42121(b)(3)(C) and 29 C.F.R. § 1980.110(e) where the complaint contained at least an arguable basis in law and where the Respondent did not make a convincing showing that the complaint or the appeal were brought for vexatious reasons. ***Reddy v. Medquist, Inc.***, ARB No. 04-123, ALJ No. 2004-SOX-35 (ARB Sept. 30, 2005).